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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

—
No. 77-414
—

CAPE PUBLICATIONS, INC. and
BUDDY BAKER and DUKE NEWCOME, Petitioners
v.
DONALD F. ADAMS, Respondent

—
**MOTION OF AMERICAN NEWSPAPER PUBLISHERS
ASSOCIATION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF AMICUS CURIAE**

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**MOTION OF AMERICAN NEWSPAPER PUBLISHERS
ASSOCIATION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE**

The American Newspaper Publishers Association (hereinafter "ANPA") respectfully moves this Court for leave to file the accompanying Brief Amicus Curiae in support of the Petition for Writ of Certiorari filed herein. Although the attorney for the Petitioners has consented to the ANPA's filing of a brief amicus curiae, the ANPA has been advised that the Respondent will not grant his consent.

The American Newspaper Publishers Association is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,250 news-

papers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a significant portion of the weekly newspaper circulation, in the United States. TODAY, Petitioners' newspaper involved in this proceeding, and thirty-eight other newspapers published in various parts of the State of Florida hold membership in the ANPA. Concerned with issues of general significance to the profession of journalism and the newspaper publishing business, the ANPA seeks to keep its members informed of, and to provide meaningful input on, matters touching on these concerns.

The Association's member newspapers, individually and through the ANPA, are ever vigilant to protect the public's right under the First Amendment to information concerning the activities of government and matters of public interest. Libel verdicts, such as that permitted to stand by the Fourth District Court of Appeal of the State of Florida in the instant case, have an inhibiting effect upon the editorial tenacity and investigative reporting of all newspapers. This inhibiting effect is heightened to an impingement on First Amendment rights where, in a public official libel case, the jury is permitted to return a verdict which includes punitive damages.

At least since 1971 when this Court decided *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), several members of this Court have expressed concern and dissatisfaction with the availability of punitive damages in libel cases.

"The unlimited discretion exercised by juries in awarding punitive and presumed damages compounds the problem of self-censorship that neces-

sarily results from the awarding of huge judgments. This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others." *Rosenbloom, supra*, at 84 (Marshall and Stewart, J.J. dissenting).

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court resolved the problem of punitive damages in libel suits brought by private individuals by requiring that such individuals prove, at a minimum, that the defamatory publication was made with knowledge of falsity or reckless disregard for the truth before punitive damages may be assessed.

The burden imposed by *Gertz* on a private individual libel plaintiff seeking punitive damages was based on this Court's recognition that there was no compelling state interest which mandated that punitive damages be available to a libel plaintiff. The Court also recognized, however, that a private individual lacks the means to counteract defamatory statements, whereas public officials and public figures not only have greater access to the media to counteract libelous publications but also have voluntarily exposed themselves to such comment. Therefore, the Court held that private individuals could recover punitive damages, but only upon a showing at least of "actual malice."

As this Court frequently has indicated, one of the most important functions of a free press is to inform the citizenry of all matters coming to its attention which bear on the character and competence of public officials and their fitness to hold office. Although the holdings in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and related cases provide the press with some protection from libel suits by public figures and public

officials, the threat of excessive punitive damage awards in such cases continues to have an inhibitory effect on the press which affects its ability to provide the public with full and complete information concerning matters of public interest. Accordingly, the members of ANPA, all of whom cherish their right and their duty to inform the public on political matters, have a significant and peculiar interest in making their views known to this Court.

WHEREFORE, the American Newspaper Publishers Association requests this Court to grant this motion and permit it to file the Brief Amicus Curiae attached hereto.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF AMERICAN
NEWSPAPER PUBLISHERS ASSOCIATION

PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") submits this brief amicus curiae in support of Petitioners', Cape Publications, Inc., Buddy Baker and Duke Newcome, Petition for a Writ of Certiorari.

INTEREST OF THE AMICUS CURIAE

As set forth in its motion for leave to file this brief, the ANPA and its member newspapers have a significant concern for insuring that the First Amendment's guarantee of a free press shall not be abridged.

The opinion of the Fourth District Court of Appeal of the State of Florida is clearly at odds with the constitutional privilege accorded to the press, as enunciated in *New York Times v. Sullivan*, 376 U.S. 254 (1964), in its failure to properly apply the *New York Times* standard to the case at issue. Moreover, although not addressed by the lower court, the punitive damage award which the jury was permitted to make graphically demonstrates the threat which the continuing availability of punitive damages in public figure and public official libel cases poses to the exercise of First Amendment rights. The press must be ever diligent to ferret out and correct unpermitted inroads upon those most cherished freedoms guaranteed by the First Amendment to the Constitution. It is respectfully submitted that this case presents such an unpermitted inroad upon the freedom of the press through the lower court's misapplication of the *New York Times* standard and the court's unconstitutional affirmation of the award of punitive damages. For that reason the ANPA desires to present to this Court, for its assistance, the Association's views in respect of the important issues placed before this Court by the Petition for a Writ of Certiorari.

ARGUMENT

At the outset, it must be pointed out that the ANPA strongly supports and adopts the position of Petitioners. ANPA believes that the Petitioners' brief persuasively and accurately describes the background of this case, delineates the multitudinous errors and misinterpretations committed in the trial court and left uncorrected by the appellate court, and forcefully presents the arguments and cases demonstrating the First

Amendment protection which should have been accorded the Petitioners in the proceedings below.

The Association wishes to address an issue not commented upon by the lower appellate court—the award of punitive damages in a libel suit brought by a public official. Petitioners have fully discussed and analyzed the evidence which was presented to the trial court and jury and clearly demonstrated that no basis existed for the award of punitive damages. The Association wishes to set forth, for this Court's consideration, the Association's views as to the propriety and constitutionality of permitting the award of punitive damages in any libel suit brought by a public figure or public official.

The First Amendment Precludes the Award of Punitive Damages in a Public Figure or Public Official Libel Case

In a case such as the instant one, where the plaintiff is uncontestedly not only a public official but has indeed thrust himself into the limelight by participating in law suits concerning his failure to perform the duties of his office and, in turn, has been publicly identified both by the Mayor's Office and by individual contractors as a grafter, there can be no question but what an award of punitive damages is precluded by a proper application of the First Amendment.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court recognized "the strong and legitimate state interest in compensating private individuals for injury to reputation." *Id.* at 348. Accordingly, the Court held that the states could define for themselves the appropriate standard of liability in private individual libel cases, so long as the states did not impose liability without fault. The Court was careful to note, however,

that the state interest involved "extends no further than compensation for *actual injury*." *Id.* at 349 (emphasis added).

Since a state's interest in compensating private individuals for injury to reputation is a limited one which must be balanced against the "constitutional command of the First Amendment," the Court held that the states could not permit recovery of presumed or punitive damages by a private individual "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for truth." *Id.* at 349. In explaining the rationale of its holding, the Court stated:

"We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Id.* at 350.

In *Gertz* this Court had no occasion to address the question as to the availability of punitive damages in a

public figure or public official case. The propriety of the award of punitive damages in libel cases, however, has been questioned by members of this Court in the past. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 59 (White, J. concurring), 65-78 (Harlan, J. dissenting), 82-86 (Marshall and Stewart, J.J. dissenting) (1971). As was pointed out in *Gertz* and in the dissenting opinion of Justice Marshall in *Rosenbloom*, there can be no doubt that the availability of punitive damages in libel suits has a real and substantial "chilling effect" on the exercise of First Amendment rights. Moreover, the *Gertz* opinion established that the impairment of First Amendment rights occasioned by the threat of punitive damages cannot be justified by any countervailing important and substantial state interest.

Analysis of the individual rights and state interests which libel laws are intended to protect (and which punitive damages in libel suits are intended to vindicate) demonstrates that there is no place in First Amendment jurisprudence for the award of punitive damages to public figure and public official libel plaintiffs. Libel law serves to protect two separate interests of the individual (interests with which the states also are concerned): "first, his desire to preserve a certain privacy around his personality from unwarranted intrusion, and, second, a desire to preserve his public good name and reputation." *Rosenbloom, supra* at 48; see also, *Maheu v. Hughes Tool Co.*, 384 F.Supp. 166, 170-171 (C.D.Cal. 1974).

In *Gertz* it was determined that a private individual should be permitted, once having established liability, to further vindicate these interests through the recovery of punitive damages—but only if the plaintiff were

able to establish that the defamatory publication had been made at least with "actual malice," as defined in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny. The Court's reasoning was twofold: 1) that private individuals do not enjoy the access to effective channels of communication, for purposes of counteracting false statements, which is enjoyed by public figures and public officials; and 2) that public figures and public officials have invited scrutiny of their private lives, whereas private individuals have not.

Public figures and public officials necessarily relinquish a part of their reputational interest by placing themselves before the public eye. Close scrutiny of their actions is to be expected, and they must anticipate some criticism, for they "have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them." *Gertz, supra* at 345; see also, *Maheu, supra* at 171. The public has a right to be informed as to those matters which reflect on the reputations of public figures and public officials, and there is no compelling state interest, justifying the award of punitive damages, which supersedes the First Amendment right of the press so to inform the public.

Nor is there any important state interest in protecting the privacy of public figures and public officials, justifying imposition of punitive damages, which overrides the substantial and constitutionally sanctioned societal interest in "uninhibited, robust, and wide-open" debate on public issues. *New York Times v. Sullivan, supra* at 270.

"Since public figures are described as those who have invited attention, comment, and publicity by

occupying positions of influence or by thrusting themselves onto the stage of community affairs, it may be persuasively argued that they have made their private personality and affairs matters of public business."

Maheu v. Hughes Tool Co., 384 F.Supp. at 171 (citations omitted). Society's interest in the private activities of public figures and public officials, at least insofar as such activities are relevant to those matters which concern the reasons for the public individual's being in the public eye, are guaranteed protection by the First Amendment.

Considering the commitment of this Nation, and of this Court, to the significant rights which are protected by the First Amendment, and considering the inhibitory and self-censorious effects which the potential for the award of punitive damages in a public figure or public official libel case poses to the press, the propriety of the availability of such damages cannot be maintained. This is especially true in light of this Court's discussion of "actual" or "compensatory" damages in *Gertz*. In *Rosenblom v. Metromedia, Inc.*, 403 U.S. 29 (1971), the plurality expressed concern as to the difficulty of ascertaining and defining "actual damages" in a libel case. While leaving the ultimate decision to trial courts, through the use of jury instructions, to define "actual damages," this Court, in *Gertz*, provided an expansive and broad categorization of those types of harm which could be considered in assessing such damages:

" . . . actual injury is not limited to out-of-pocket loss . . . [but also includes] impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."

Gertz v. Robert Welch, Inc., 418 U.S. at 350. The Court was careful to admonish trial courts to limit the award of such damages to those actually suffered by appropriately instructing the jury. Nevertheless, it cannot be doubted that, in pondering such abstract kinds of injuries, juries may be swayed by emotion and by their belief in the "rightness" or "wrongness" of a defendant's conduct. Such discretion granted to a jury in fixing the "actual damages" of a libel, demands that the jury not be permitted to further punish the defendant by adding punitive damages. For, after all, the purpose of civil actions is to make the injured plaintiff whole; not to unjustly enrich him with a windfall punitive damage award.

The elimination of punitive damage awards in public figure and public official cases would not tend to reduce such a plaintiff's opportunity to be fully recompensed for the wrong, nor would it allow the libellee to go unpunished. If a public figure or public official proves that a defamatory publication was made with actual malice (the minimum standard for recovery of punitive damages by a private individual), then the plaintiff will be entitled to recover "actual damages." Even in the absence of punitive damages, the plaintiff's recovery may be influenced by the "maliciousness" of the offending publisher.

The State of Washington has long held that punitive or exemplary damages are not recoverable in libel actions. See, *Ott v. Press Pub. Co.*, 82 P.403 (Wash. 1905). Nevertheless, in *Farrar v. Tribune Publishing Co.*, 358 P.2d 792 (Wash. 1961), the Supreme Court of Washington held that, in a case where defamation had

been established, evidence of malice (*i.e.* common law malice, *viz.* ill will, etc.) was admissible to show the intensity and severity of mental suffering and injury to feelings, or lack thereof, constituting the "actual" injury to the plaintiff. The same theory would obtain in a libel suit by a public figure or public official where punitive damages were not recoverable.

As several members of this Court have stated: the potential for awards of excessive punitive damages by juries in the exercise of "unbridled discretion" has a significant inhibitory effect on freedom of speech and press. Where public figures and public officials are involved as plaintiffs in libel suits, there are no countervailing important and substantial state interests in the availability of punitive damages which can override the significant First Amendment rights at stake. This Nation's commitment to full and free discussion of public events, and the individuals connected therewith, must not be diluted or curtailed by the threat of punitive damage awards in libel cases brought by individuals concerning whom the public has a right to be informed.

CONCLUSION

Your Amicus respectfully submits that the instant case dramatically demonstrates the censorious and inhibitory effect of permitting practically unlimited jury discretion in the award of punitive damages in public official or public figure libel cases. Analysis of both public policy considerations and the opinions of various members of this Court in prior cases concerning constitutional limitations upon recovery in the area of defamation makes it clear that the robust and vig-

orous exercise of press freedom envisioned by the framers of the Constitution cannot withstand the capricious award of punitive damages which, to an impermissible degree, is incapable of reversal on appeal under existing law. For these reasons, along with those set forth in the Petition for a Writ of Certiorari, this case merits critical review by this Court, and it is respectfully urged that the Petition for Writ of Certiorari therefore be granted.

Respectfully submitted,

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